No. 125443

In the

Supreme Court of Illinois

MEDPONICS ILLINOIS, LLC, an Illinois Limited Liability Company,

Plaintiff-Appellant,

v.

ILLINOIS DEPARTMENT OF AGRICULTURE, RAYMOND POE, Director of the Illinois Department of Agriculture, JACK CAMPBELL, Chief of the Bureau of Medicinal Plants of the Illinois Department of Agriculture, and CURATIVE HEALTH CULTIVATION, LLC, an Illinois Limited Liability Company,

Defendants-Appellees.

Appeals from the Appellate Court of Illinois,
Second Judicial District, Case Nos. 2-17-0977, 2-18-0013 & 2-18-0014 (consolidated).
The Honorable **Michael J. Fusz**, Judge Presiding.

REPLY BRIEF OF APPELLANT

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Plaintiff-appellant Medponics Illinois, LLC ("Medponics") submits this brief in reply to the briefs of defendants-appellees Illinois Department of Agriculture, Raymond Poe, director of the Illinois Department of Agriculture, and Jeffrey Cox, chief of the Bureau of Medicinal Plants of the Illinois Department of Agriculture (collectively "IDOA") and Curative Health Cultivation, LLC ("Curative").

Preliminary Statement

It must be noted at the outset that Curative's brief is more of an *amicus curiae* brief than it is a party brief. Indeed, if Curative sought to appear in this action as an *amicus curiae*, it is likely that leave to do so would be denied. This is because the bulk of Curative's brief is devoted to summarizing the appellate court's decision, summarizing the respective arguments of Medponics and IDOA on each point, and concluding that IDOA's position is correct without additional argument. This Court's observations about the *amicus curiae* brief that it declined to consider in *Kinkel v. Cingular Wireless, LLC*, 2006 Ill. LEXIS 1 (Ill. Jan. 11, 2006), apply with equal force to Curative's brief here:

> Briefs which essentially restate arguments advanced by the litigants are of no benefit to the court or the adversarial process. To the contrary, they are a burden on the court's time and on the resources of the litigants who must review and respond to them.
>
> *Id.* at *3.
>
> * * *
>
> Taken as a whole, the Chamber's brief provides no significant insights into the merits of the case beyond those offered by able counsel for Cingular Wireless. It fills no analytical gaps. It gives no tangible examples of how the appellate court's decision affects companies or consumers in ways we could not have gleaned from Cingular's presentation. In the end, it tells us nothing more about the case except how the Chamber believes it

> should be resolved. That is not a sufficient basis to warrant its participation in this case.
>
> *Id.* at *6.

Because Curative's brief offers so little original argument and instead simply agrees with IDOA, Medponics in this reply refers primarily to IDOA and its brief. The few additional points that Curative has raised are noted and responded to with citation to the pertinent pages of Curative's brief.

Argument

I. Under the Aurora Zoning Ordinance, the R-1 and R-5 districts are zoned exclusively for residential use.

It is undisputed that Curative's cultivation center location is less than 2,500 feet from Aurora's R-1 and R-5 residential districts. (C2052 at ¶39, C5226-C5228) In its opening brief, Medponics argued that Aurora's R-1 and R-5 residential districts are zoned exclusively for residential use under the Aurora Zoning Ordinance. (Medponics Brf., pp. 16-18) IDOA does not squarely address Medponics' argument and instead asserts that "residential districts" and "residential areas" are not the same for two different reasons, both of which fail. (IDOA Brf., pp. 15-17)

First, IDOA asserts that because the Ordinance definition of "residential area" includes the phrase "zoning lot," the Ordinance zones "certain single plots of land" as exclusively residential, but not entire residential districts. (IDOA Brf., p. 16) However, IDOA cites no support for this novel interpretation. Further, if IDOA is correct on this, then individual lots zoned as exclusively residential are randomly scattered throughout Aurora regardless of the zoning district in which they are located – Open Space, Park and Recreation; Residential; Business; Manufacturing; Office, Research and Industrial; Research and Development; Downtown Core; Downtown Fringe; Office; and Planned

Development. (A89) This is clearly not the case. Indeed, the suggestion by IDOA is nonsensical and contravenes the stated intent and purpose of the Ordinance, which is to divide Aurora into distinct districts serving different municipal needs:

> **SECTION 2. INTENT AND PURPOSE**
>
> **2.1. Intent and Purpose.**
>
> 2.1-1. To divide the City of Aurora into zones or districts restricting and regulating therein the location, erection, construction, reconstruction, alteration and use of buildings, structures and land for residence, business and manufacturing and other specified uses with the general purpose of promoting and protecting the public health, safety and general welfare of the people of Aurora and of implementing the Aurora Comprehensive Plan[.][1]
>
> (Aurora Zoning Ordinance, aurora-il.org/DocumentCenter/View/948/Appendix A---Zoning-Ordinance-PDF, last viewed January 12, 2021)

Second, IDOA argues that "residential districts" and "residential areas" are different because the Ordinance states that the purpose of "residential districts" is to protect "residential areas." (IDOA Brf., pp. 16-17) IDOA is correct regarding the Ordinance language on this point:

> **SECTION 7. RESIDENTIAL DISTRICTS**
>
> **7.1 Purpose.**
>
> 7.1-1. The residential districts set forth herein are established in order to protect public health, and promote public safety, convenience, comfort, morals, prosperity and welfare. These general goals include, among others, the following specific purposes:

[1] The Aurora Comprehensive Plan was adopted on April 3, 1984 and is available to the public on Aurora's website, aurora-il.org/1746/Comprehensive-Plans (last viewed January 12, 2021).

> 7.1-1.1. To protect residential areas against fire, explosion, noxious fumes, offensive noise, smoke, vibrations, dust, odors, heat, glare and other objectionable factors.
>
> 7.1-1-2. To protect residential areas to the extent possible and appropriate in each area against unduly heavy motor vehicle traffic, especially through traffic, and to alleviate congestion by promoting off-street parking.
>
> 7.1-1-3. To protect residential areas against undue congestion of public streets and other public facilities by controlling the density of population through regulation of the bulk of buildings.
>
> (Supp. A8)

That said, however, IDOA's argument again fails. Given that "residential areas" are zoned "exclusively for residential purposes" (A88), it cannot be that the "residential districts" intended to protect "residential areas" would not also be zoned "exclusively for residential purposes." Indeed, per the foregoing Ordinance terms, the only logical reading of the Ordinance is that "residential districts" are comprised of "residential areas" and therefore zoned as "residential areas," which means that "residential districts" – like "residential areas" – are "designed or used exclusively for residential purposes." (A88)

II. IDOA's interpretation of "area zoned exclusively for residential use" impermissibly limits the scope of the Act's cultivation center location requirement to less than all municipalities in the state.

In its opening brief, Medponics argued that IDOA's interpretation of the rule at issue impermissibly limits the scope of the Act's cultivation center location requirement to those municipalities that do not allow special uses permits for non-residential uses in districts zoned exclusively residential instead of all municipalities in the state. (Medponics Brf., pp. 26-30)

IDOA responds to this argument in one paragraph in which it does not address or distinguish Medponics' principal authority on this point, *Hadley v. Illinois Dep't of*

Corrections, 224 Ill. 2d 365 (2007), or cite any contrary authority.[2] Instead, IDOA asserts that, under its interpretation of the rule, the Act's cultivation center location requirement applies in all municipalities across the state but will not be "invoked" in municipalities which permit non-residential special uses in areas zoned exclusively residential under the local zoning ordinance. (IDOA Brf., pp. 14-15) IDOA's position is unsupported and illogical, as demonstrated by its footnoted analogy to Section 48-10 of the Criminal Code of 2012 pertaining to dangerous animals, 720 ILCS 5/48-10. (IDOA Brf., p. 15, n. 7)

Subject to specified statutory exceptions, Section 48-10 (b) prohibits the ownership of statutorily defined dangerous animals. Section 48-10 can be invoked in any location throughout the state in which a person owns a dangerous animal in violation of its terms. Although such invocation depends upon the unlawful ownership of a dangerous animal, it is always a possibility everywhere. Here, by contrast, if IDOA's interpretation of the regulation at issue is correct, the Act's cultivation center location requirement could not be invoked in any municipality that permits non-residential special uses in those areas identified in the local zoning ordinance as exclusively residential. This is because the Act's cultivation center location requirement does not apply in such areas, which in turn means that, under IDOA's interpretation of the regulation at issue, the Act's cultivation center location requirement is not applicable in all municipalities throughout the state.

[2]Curative's attempt to distinguish *Hadley* is limited to one sentence: "Here, the factual scenarios are so disparate that it is hard to see how the holdings in *Hadley* could apply to this situation concerning a setback related to the cultivation of medical cannabis." (Curative Brf., pp. 43-44)

Curative's only individual response on this point is that Medponics waived this argument by not including it in the verified second amended complaint. (C2045-C2456) (Curative Brf., pp. 38-41) Curative is wrong for two reasons.

First, an argument made for the first time on appeal is not waived if it "concern[s] the main issue" before the reviewing court and is "inherent in it." *In re Estate of Lehman*, 29 Ill. App. 3d 321, 323 (5th Dist. 1975). Here this is precisely the situation. In the verified second amended complaint, Medponics alleged that IDOA erroneously awarded the ISP District 22 permit to Curative because Curative cultivation center was located too close to two areas zoned exclusively for residential use in violation of the Act's cultivation center location requirement. (C2060; see also C2484-C2494, C2054) In response to the verified second amended complaint, IDOA and Curative argued that Aurora's R-1 and R-5 zoning districts are not zoned exclusively for residential use because the Aurora Zoning Ordinance allows special use permits for non-residential uses in those districts. (C2548-C2580, C2583-C2635) This is the very issue before this Court. Medponics' argument that the effect of IDOA's interpretation of the rule is to impermissibly restrict the scope of the Act's cultivation center location requirement is thus a legal argument "concern[ing] the main issue" before this Court and "inherent in it." *In re Estate of Lehman*, 29 Ill. App. at 323. It therefore has not been waived.

Second, Medponics first raised this argument in its appellee's brief at the appellate court level in response to Curative's argument in its opening appellant's brief that some municipal zoning ordinances in Illinois, such as that in the Village of North Barrington, do not permit non-residential special uses within areas zoned exclusively for residential use. (A46-A47, A56-A58) In this regard, Curative asserted in the appellate

court that "[a]s such, there are in fact zoning districts in this state which are 'exclusively residential,' the same are just not located in Aurora." (A46-A47, A56-A58) It is axiomatic that Medponics cannot waive an argument that it raised for the first time under these circumstances. *See, e.g., People v. Polk*, 2014 IL App (1st) 122017, ¶¶67-68 (Gordon, P.J., dissenting) (an argument is properly raised for the first time in a reply brief if it a response to argument raised by the appellee in its brief). And even if there was a waiver – which there was not – this Court has established that "where the appellate court reverses the judgment of the circuit court, and the appellee in that court brings the case before this court as an appellant, that party may raise any issues properly presented by the record to sustain the judgment of the circuit court." *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). Medponics' argument here is supported by the record and is advanced "to sustain the judgment of the circuit court" – it thus is not waived.

III. IDOA's interpretation of the rule's phrase "area zoned exclusively for residential use" impermissibly treats special use permits as zoning amendments.

In its opening brief, Medponics argued that IDOA's interpretation of the rule's phrase "area zoned exclusively for residential use" as "area zoned exclusively for residential use **with no special use permits allowed**" (emphasis added), if accepted, means that the availability of special use permits in an area zoned exclusively residential changes that area's zoning designation to something else. Medponics argued further that this result cannot stand because the availability of special use permits within a particular zoning district does not change that district's zoning designation. (Medponics Brf., pp. 18-21)

IDOA does not respond to this argument other than to say "[t]he Department has never argued this." (IDOA Brf., p. 14) By failing to respond to this argument on the merits, IDOA has conceded that Medponics is correct. *See, e.g., Macknin v. Macknin*, 404 Ill. App. 3d 520, 528 (2nd Dist. 2010) ("An appellee's failure to respond to an argument raised in the appellant's brief may constitute a concession.").

In any event, IDOA's argument that its interpretation of the rule is reasonable demonstrates that its interpretation is essentially a zoning amendment. (IDOA Brf., pp. 9-12) In this argument, IDOA focuses only on the definition of "exclusively" as used in the rule at issue. (IDOA Brf., pp. 9-12) IDOA ignores the word "exclusively" in the Ordinance as discussed above and in Medponics' opening brief. The appellate court took the same approach in deferring to IDOA's interpretation of the rule and focused only on the word "exclusively" in the rule:

> The plain language of the IDOA rules intends to prohibit cultivation centers within 2,500 feet of areas zoned "exclusively" for residential use. 8 IL ADC 1000.10. The term "exclusively" does not present ambiguity. The term "exclusively" is defined as "apart from all others," "solely," and "to the exclusion of all others." See Oxford Online Dictionary, https://en.oxforddictionaries.com/definition/us/exclusively (last visited Mar. 4, 2019). (A17, ¶32)

Because the Act and the rule include the phrase "zoned for," the Ordinance language must be considered and given full effect. By ignoring the word "exclusively" in the pertinent provision of the Ordinance – the definition of "residential area" – in concluding that the R-1 and R-5 districts are not "exclusively" residential because non-residential special uses are permitted there, IDOA treats the availability of special use permits in the R-1 and R-5 districts as a zoning amendment which eliminates the word "exclusively" from the Ordinance's definition of "residential area." This was erroneous

because Illinois law is long-established that the availability of special uses in a particular zoning district does not change that district's zoning designation. *See, e.g., Consumers Illinois Water Co. v. County of Will*, 220 Ill. App. 3d 93, 96 (3d Dist. 1991).

IV. The appellate court erred in relying upon materials outside the administrative record to reach its decision.

Medponics argued in its opening brief that the appellate court erred in relying upon materials outside the administrative record in deferring to IDOA's interpretation of the rule – a letter from the City of Aurora to IDOA dated April 29, 2015 and IDOA's "Medical Cannabis Pilot Program Frequently Asked Questions" document ("FAQ") dated February 18, 2015. (Medponics Brf., pp. 21-25) IDOA responds to this argument by asserting only that "Medponics has not demonstrated any improper reliance on extra record materials by the appellate court." (IDOA Brf., p. 18) Curative, on the other hand, agrees with Medponics that "the letter and the FAQ materials from the IDOA's website were clearly considered" by the appellate court. (Curative Brf., p. 36; see also Curative Brf., p. 35) Medponics submits that the appellate court's order speaks for itself, as Curative has also recognized. The appellate court considered the letter and FAQ in concluding that IDOA's interpretation of the rule was not clearly erroneous and this it could not do. *See, e.g., Board of Education v. State Educational Labor Relations Board*, 318 Ill. App. 3d 144, 146 (4th Dist. 2009) ("On review of an administrative agency decision, this court is limited to considering the record that was before the agency and may not consider new or additional evidence.").

As to the letter, Curative asserts further that the appellate court did not render a "specific holding" in its appeal of the circuit court's denial of its motion to supplement the administrative record with the letter, "so it is clear that the appellate court agreed with

Curative and found that the contents of the letter should be included in this administrative record." (Curative Brf., p. 10, n. 2) This is incorrect. The appellate court did not reach this issue: "Based on our reversal of the trial court's administrative review findings, we need not reach Curative's remaining contentions." (A23, ¶43) This statement cannot be construed as a holding on the merits any more than this Court's denial of a petition of leave to appeal can be so construed. *See, e.g., Mattis v. State Universities Retirement System*, 212 Ill. 2d 58, 76 (2004) ("The denial of a petition for leave to appeal has no precedential effect and in no way amounts to a consideration of the merits of the case. Nor does it indicate approval of the appellate court's action.").

V. The appellate court erred in deferring to IDOA's interpretation of the regulation at issue instead of reviewing it *de novo.*

Finally, as discussed in the Preliminary Statement section of Medponics' opening brief, where an agency is charged with the administration and enforcement of a statute, courts will defer to the agency's interpretation of its own rule or regulation under the statute on *de novo* review only if (1) the relevant statutory language is ambiguous, **and** (2) the agency's interpretation is not clearly erroneous, arbitrary, or unreasonable. Medponics argued that the appellate court here erred in deferring to IDOA's interpretation of the regulation at issue instead of reviewing it *de novo* because the Act's cultivation center location requirement is not ambiguous. (Medponics Brf., pp. 12-15) IDOA did not respond to this argument on the merits. (IDOA Brf., pp. 8-9, 13) Instead, IDOA asserts only that Medponics' position on this point should be summarily rejected because "the issue before the Court is not the proper interpretation of the Act, but the proper interpretation of the regulation." (IDOA Brf., p. 13) By failing to respond to the substance of Medponics' argument, IDOA has conceded that Medponics is correct: the

Act's cultivation center location requirement is not ambiguous, which means that the appellate court erred in deferring to IDOA's interpretation of the regulation at issue instead of reviewing that interpretation *de novo*. *See, e.g., Macknin,* 404 Ill. App. 3d at 528.

Conclusion

WHEREFORE, for the reasons stated and on the authorities cited in this brief and in its opening appellant's brief, plaintiff-petitioner Medponics Illinois, LLC respectfully requests that this Court reverse the appellate court's order of October 7, 2019 and affirm the circuit court's orders of August 24, 2017 and November 30, 2017. Medponics Illinois, LLC also requests all such other and further relief to which this Court finds it entitled.

Respectfully submitted,

/s/ Melissa A. Murphy-Petros

By:_____
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 11 pages.

/s/ Melissa A. Murphy-Petros
Melissa A. Murphy-Petros

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

MEDPONICS ILLINOIS, LLC,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 125443
	)	
ILLINOIS DEPARTMENT OF AGRICULTURE, et al.,	)	
	)	
	)	
Defendants-Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on January 12, 2021, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellant. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

SEE ATTACHED SERVICE LIST

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Melissa A. Murphy-Petros
Melissa A. Murphy-Petros

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Melissa A. Murphy-Petros
Melissa A. Murphy-Petros

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